

United States  
Circuit Court of Appeals

For the Ninth Circuit. *y*

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ANNIE JENSEN and CHRISTIAN JENSEN,  
Appellants,

vs.

T. J. SPARKES, Trustee in Bankruptcy of  
O. STANLEY DRESHER, Bankrupt,  
Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the District of Arizona.

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**FILED**

AUG 6 - 1931

PAUL P. O'BRIEN,  
CLERK



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Circuit Court of Appeals

For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD.

STOCKTON and PERRY, Security Building,  
Phoenix, Arizona,  
Attorneys for Appellant.

WALTER J. THALHEIMER, Luhrs Building,  
Phoenix, Arizona,  
Attorney for Appellee. [3\*]

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In the District Court of the United States, for the  
Federal District of Arizona.

IN BANKRUPTCY—No. B.-557—PHOENIX.

In the Matter of O. STANLEY DRESHER, Bank-  
rupt.

ORDER OF UNITED STATES DISTRICT  
JUDGE ON REVIEW FROM REFEREE.

The petition to review Referee's order in the above entitled and numbered bankruptcy matter came on regularly for hearing before the Honorable FRED C. JACOBS, United States District Judge, on May 25th, 1931, at which time the petitioners were represented by their attorneys, Stockton & Perry, and the Trustee in Bankruptcy was represented by his attorney, Walter J. Thalheimer.

After argument of counsel, the Court, being fully advised in the premises,—

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\*Page-number appearing at the foot of page of original certified Transcript of Record.

IT IS ORDERED that the order of the Referee, dated April 11th, 1931, be modified so as to read as modified as follows:

At Phoenix, Arizona, in said District, on this 11th day of April, 1931, before Honorable R. W. SMITH, Referee in Bankruptcy.

IT IS ORDERED that the sum of Fifteen Hundred Dollars (\$1500.00) paid by the bankrupt on November 30, 1928, to lessor, predecessor in interest to claimant, was an advancement for the security of the lessor, title to which remained in the bankrupt, and, on his bankruptcy, title vested in the trustee; that interest on said sum of Fifteen Hundred Dollars (\$1500.00) from November 30, 1928, to July 18, 1930, at the rate of ten per cent per annum, is due from claimant to the bankrupt estate; that the amount of said interest is Two Hundred Thirty-two and 80/100 [4] Dollars (\$232.80) less One Hundred Eighty-seven and 50/100 Dollars (\$187.50) paid by claimant prior to bankruptcy, or forty-five and 30/100 Dollars (\$45.30).

IT IS ORDERED that from said sum of Fifteen Hundred Forty-five and 30/100 Dollars (\$1545.30), rental in the sum of Six Hundred Twenty-one Dollars (\$621.00) due claimant for rent accrued prior to bankruptcy be offset and, in addition thereto, the further sum of Four Hundred Twenty-nine Dollars (\$429.00), which sum is hereby allowed for the use and occupancy of the leased premises by the Trustee from July 18th, 1930, to October 1st, 1930, be also offset.

IT IS ORDERED that Annie Jensen and Christian Jensen pay to the Trustee in Bankruptcy of the



above-named bankrupt Four Hundred Ninety-five and 30/100 (\$495.30) Dollars, the amount herein found due from claimant to said bankrupt estate.

Dated this 11th day of April, 1931.

R. W. SMITH,

Referee in Bankruptcy.

Service of the foregoing and receipt of copy is acknowledged this 21st day of April, 1931.

STOCKTON and PERRY,

Attorneys for Claimants.

And as so modified, the said order of the Referee is hereby approved and affirmed.

An exception is allowed the Trustee and an exception is also allowed petitioners.

Done in open court this the twenty-fifth day of May, 1931.

F. C. JACOBS,

United States District Judge.

Filed May 27, 1931. [5]

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[Title of Court and Cause.]

### STATEMENT OF THE CASE.

With the approval of the above-entitled court hereunder endorsed, the parties in interest prepare and sign this statement of the case and show how the questions arose and were decided in the District Court.

The facts are stated in a stipulation prepared and signed by the parties, which is in the words and figures following, to wit:

“IT IS HEREBY STIPULATED by and between respective counsel of Annie Jensen and Christian Jensen, husband and wife, claimants herein, and T. J. Sparkes, Trustee in Bankruptcy of the estate of O. Stanley Dresher, bankrupt, that the following are facts which need not be proved except by this stipulation, and that the rights of the parties may be adjudicated upon such facts:

1. That O. Stanley Dresher filed a petition in bankruptcy in the above named court on July 18, 1930, and that he was thereafter on July 21, 1930, duly adjudged a bankrupt. That on August 21, 1930, T. J. Sparkes was duly qualified as trustee in bankruptcy of said bankrupt.

2. That Albert Jensen of Miami, Arizona, as lessor, entered into a lease in writing with O. Stanley Dresher on the 30th day of November, 1928, a true copy of which lease is set forth in full in the amended proof of secured debt filed herein on the 23rd day of January, 1931.

3. That the building mentioned and described in said lease was completed and possession thereof was given and the term of the lease began March 1, 1929. That bankrupt continued to occupy said building under said lease to July 18, 1930, the date upon which his petition in bankruptcy was filed.

4. That on November 30, 1928, O. Stanley Dresher, lessee, paid to the lessor, pursuant to the terms of said lease, Fifteen Hundred Dollars (\$1500.00).

5. That the said O. Stanley Dresher, the above named bankrupt, failed to pay any rent to the said

[6] Annie Jensen and Christian Jensen, as provided by the terms of said lease, for the months of April, May, June and the first seventeen days of July, 1930, such rental amounting to the sum of \$621.00.

6. That no note has been received or given for said rent, nor for any part thereof, nor has any judgment been rendered thereon; that said Annie Jensen and Christian Jensen are to pay, and are ready, able and willing to pay said bankrupt and/or his trustee in bankruptcy, interest as provided by the terms of said lease upon said sum of Fifteen Hundred Dollars (\$1500.00) paid as in said lease provided and herein recited in the manner and at the time specified in said lease, and said Annie Jensen and Christian Jensen hereby offer to so do.

7. That prior to bankruptcy Annie Jensen and Christian Jensen paid to bankrupt on account of interest on the said sum of Fifteen Hundred Dollars (\$1500.00) hereinbefore mentioned and in the lease specified, the sum of One Hundred Eighty-seven and 50/100 Dollars.

8. That the trustee in bankruptcy of the above named bankrupt abandoned the lease described herein and vacated the premises on the 24th day of September, 1930; that said bankrupt failed to make any payments accruing under said lease subsequent to the date of bankruptcy and the said trustee in bankruptcy has paid no sum to claimants on account of rent or for the use and occupancy of the premises described in said lease by the trustee after the filing of the petition in bankruptcy.

9. That Annie Jensen does not have any other or additional security for the payment of the debt mentioned in said amended proof of secured debt.

10. That on or prior to October 1, 1930, Annie Jensen leased the premises described in said lease to Carroll Chevrolet Motor Company upon a written lease beginning October 1, 1930, and extending for a period of five years and at a rental of One Hundred Dollars (\$100.00) per month for the first four months, One Hundred Twenty-five Dollars (\$125.00) per month for the next five months and the balance of the term of the lease at One Hundred Fifty Dollars (\$150.00) per month. That said last mentioned lease was made upon the most favorable terms that Annie Jensen could obtain after using due diligence.

11. That on May 2, 1929, Albert Jensen of Miami, Arizona, lessor in said lease named, sold and transferred to Annie Jensen the rent theretofore accruing and to thereafter accrue under said lease, and on the same date conveyed the real property described in the said lease to Annie Jensen and said Annie Jensen is now the owner of said real property and by virtue of said transfer and conveyance she is entitled to the rent accruing prior to bankruptcy and to compensation for the use and occupancy described in the lease by the trustee after the date of the filing of the petition and if any obligation existed on Albert Jensen by virtue of the payment of said [7] sum of Fifteen Hundred Dollars (\$1500.00) pursuant to the terms of said lease, that obligation has been assumed by and is now the obligation of Annie Jensen.

12. That subsequent to the trustee's qualification, he demanded of Annie Jensen the payment and return to said trustee of the sum of Fifteen Hundred Dollars (\$1500.00) paid by lessee to lessor in accordance with the terms of said lease. That Annie Jensen refused to comply with said demand in whole or in part and no sum has been paid by Annie Jensen or anyone in her behalf to said trustee.

13. It is further stipulated and agreed by and between the respective parties hereto, acting through their attorneys, that questions of law involved herein may be submitted upon briefs; that the claimants shall have ten (10) days from the date hereof in which to file their brief; that the trustee in bankruptcy shall have ten (10) days from the filing of the claimants' brief in which to reply to same; and the claimants shall have five (5) days from the filing of the trustee's brief in which to reply thereto.

Dated March 20th, 1931.

WALTER J. THALHEIMER,  
Attorney for Trustee.  
STOCKTON & PERRY,  
Attorneys for Claimants."

The questions arose upon the filing by Annie Jensen and Christian Jensen, husband and wife, on the 23d day of January, 1931, with the Referee in charge of the above bankruptcy proceedings, an amended proof of secured debt in the words and figures following, to wit:

"At Miami, Arizona, in the District of Arizona, on the 19th day of January, A. D. 1931, came Annie

Jensen and Christian Jensen, husband and wife, of Miami, Arizona, in the County of Gila, in said District of Arizona, and made oath and say:

That O. Stanley Dresher, the person by whom a petition for adjudication in bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said Annie Jensen, deponent, in the sum of \$621.00; that the consideration of said debt is as follows:

Rent for April, May, June and the first seventeen days of July, 1930, at the rate of \$175.00 per month, accrued prior to July 18, 1930, the date of bankruptcy herein, under and pursuant to a lease in writing, which is in the words and figures following, to wit: [8]

#### ‘AGREEMENT OF LEASE.

THIS INDENTURE made between ALBERT JENSEN, of Miami, Arizona, of the first part, lessor, and O. STANLEY DRESHER, of Superior, Arizona, of the second part, lessee.

#### 1.

WITNESSETH: That the first party, in consideration of the covenants of the second party, hereinafter set forth, does by these presents let, lease and demise, and has let, leased and demised to and unto the second party the following described property, namely:

Lots eighty-one (81) and eighty-two (82), of Block Sixteen (16), of the original townsite of SUPERIOR, Pinal County, Arizona, according to the STEWART map thereof.

2.

TO HAVE AND TO HOLD the same to and unto the second party for the period of five years.

- a. The said five year period shall begin to run on the date of completion of the building to be constructed on said premises by and at the expense of first party, hereinafter mentioned; or,
- b. In the event that second party occupies the said building prior to completion thereof, then the said five year period shall begin as of the date of such occupancy.
- c. Provided, however, that the said five year period shall begin not later than six months from the date hereof.
- d. To obviate any future confusion as to the date of beginning of the said five year period, when occupancy of the building shall start, the parties hereto shall sign a properly identified written statement of the date of beginning of the five year period, duly acknowledge the same, and a complete copy thereof shall be furnished to each party hereto.

3.

THE SECOND PARTY, in consideration of the leasing of the premises as above set forth, covenants and agrees with the first party to pay to the first party, as rent for the same, the MONTHLY sum of ONE HUNDRED and SEVENTY FIVE (\$175.00) DOLLARS, but this is a lease for five years, and not from month to month, and said rent shall be paid in the manner following: [9]

- a. The monthly payments of \$175.00 shall be paid in advance on the first day of each month.
- b. In event that occupancy should be started other than on the first day of a month, then the first payment shall be paid in advance, and is to be computed on the basis of \$175.00 per month from date of beginning of occupancy to the last day of the month in which occupancy begins.
- c. On the date of the execution and acknowledgment of this lease by the respective parties, the SECOND PARTY is to and shall pay to first party the sum of ONE THOUSAND FIVE HUNDRED (\$1,500.00) DOLLARS, being, approximately, for the last eight and four-sevenths months of the five year period covered by the lease.
- d. The first party is to and shall pay to second party interest on said FIFTEEN HUNDRED (\$1500.00) DOLLARS at the rate of ten-percent per annum, said interest payable annually, and said interest shall begin to run from the date the said \$1,500.00 is paid to first party by second party, and shall continue in effect, *pro tanto*, until the entire \$1,500.00 shall have been earned and absorbed by rent for the period to which it is made herein to pertain.

## 4.

A CONDITION precedent of, and intent of this lease is that FIRST PARTY must, will and shall,



and at his own risk and expense, within 30 days from the date hereon, BEGIN and continue, in good faith, the construction of a concrete building on aforesaid lots, which said concrete building shall have a frontage of fifty feet on MAIN STREET and be one hundred feet in depth.

The said building shall be constructed in accordance with plans prepared by the CHEVROLET MOTOR COMPANY, Detroit, Michigan, for the PINAL MOTOR COMPANY, Superior, Arizona, and designated as "Job No. 2912, Sheet No. 1," which plans are attached hereto, and signed on the face thereof, by the respective parties hereto, and made a part hereof as if drawn and written herein *in haec verba*.

The said plans are subject to the following exceptions and modifications:

- a. The concrete walls shall be ten inches in thickness. [10]
- b. The distance between the floor to the ceiling shall be sixteen feet.
- c. The plate glass shall be nine feet in height.
- d. There shall be only one, instead of two, toilets on the mezzanine floor.
- e. The front half of the building shall have a metal ceiling; and the rear half, used for shop purposes, shall have no ceiling.
- f. There shall be a plaster board partition in the middle of and across the building.
- g. The floor shall be of concrete, and there shall be no basement.

- h. The front sidewalk shall be covered by a substantial galvanized iron roof.
- i. An entrance, adequate for automobiles, shall be provided in the rear (south side) of the building.
- j. All usual plumbing and electrical fixtures shall be furnished and installed by first party; but it is expressly not the intention that first party shall equip the building with any fixtures that do not pertain to an ordinary building, or furnish such fixtures or equipment that pertain to an automobile sales and, or shop room.

5.

The second party shall, and at his expense, pay for water and lights, and first party shall not be required to pay for any thing or commodity other than is herein expressly provided, save taxes, insurance on buildings and matters of a like nature.

6.

ANY repairs due to fair wear and tear shall be borne by the first party, as well as damages due to Acts of God. Payment for any other repairs shall be at the expense of second party.

7.

In the event of destruction of the building by fire, or otherwise, the first party shall immediately begin to rebuild the same, and destruction of the building shall not terminate this lease. During the period of destruction of the building and its rebuilding and completion, no rent shall be charged or exacted.

8.

The second party agrees that at the expiration of this lease peaceable possession of the premises shall be given to first party in as good condition [11] as when occupancy began, the usual wear, inevitable accidents, and loss by fire excepted; and, to make no unlawful use of the premises.

Upon the non-payment of the whole, or any portion of the said rent when the same is above promised to be paid, the first party may, at his election, either restrain for said rent due, or declare this lease at an end, and recover possession as if the same was held by forcible detainer.

The second party waives notice of any such election or demand for possession, and TIME is expressly made as of the essence hereof.

9.

The stipulations herein contained shall apply to and be binding upon the heirs, executors, administrators, personal representatives and assigns of the respective parties hereto.

10.

The first party is a bachelor.

EXECUTED, in duplicate, at SUPERIOR,  
Pinal County, Arizona, NOVEMBER 30th, 1928.

ALBERT JENSEN,

First Party.

O. STANLEY DRESHER,

Second Party.

STATE OF ARIZONA,  
 PINAL COUNTY.

Personally appeared before me, the undersigned authority, one O. Stanley Dresher, to me personally known and by me known to be the party who executed the foregoing lease, and acknowledged that he executed the same for the uses and purposes therein stated, and as and for his free act and deed.

WITNESS my hand and NOTARIAL SEAL  
 this 1st of December *day of NOVEMBER*, 1928.

GEO. P. STOVALL.

(Notarial Seal) GEO. P. STOVALL,  
 Notary Public, Pinal County, Arizona.

My commission expires September 1st, 1931.

STATE OF ARIZONA,  
 PINAL COUNTY.

Personally appeared before me, a notary public, one Albert Jensen, to me personally known, and by me known to be the person who executed the foregoing lease, and acknowledged that he executed the same for the uses and purposes therein stated, and as and for his free act and deed.

WITNESS my hand and notarial seal this 1st  
 day of December, 1928.

(Notarial Seal) GEO. P. STOVALL,  
 Notary Public, Pinal County, Arizona.

My commission expires Sept. 1, 1931.' [12]

That the building mentioned and described in  
 the foregoing lease was completed and possession

thereof given and the term of the lease began on March 1st, 1929.

That O. Stanley Dresher filed a voluntary petition in bankruptcy on July 18, 1930, and was adjudicated a bankrupt on July 21st, 1930; that bankrupt had failed to pay any rent to deponent as provided by the terms of said lease, for the months of April, May, June and July of 1930;

That said indebtedness of bankrupt to deponent, to wit: the sum of \$621.00, was for rent accruing and earned for the months of April, May, June and July up to the 18th day thereof, the date of bankruptcy; that said amount, to wit: \$621.00, is secured by virtue of the provisions of Chapter 41 of the Revised Code of Arizona, 1928, and particularly Section 1958 thereof, upon the property of the bankrupt, which was in and upon the leased premises at the date of bankruptcy and which property passed into the hands of the Trustee in bankruptcy of the above named bankrupt, and has, by said Trustee, been converted into money and the amount realized therefrom is in excess of \$621.00, the amount due deponent secured by said property; that no part of the said debt has been paid; that contemporaneously with the execution of the lease, bankrupt paid to deponent \$1500.00, being the last rent to accrue under said lease and covering approximately the last eight and four-sevenths months of the term of said lease.

That no note has been received for said indebtedness nor for any part thereof, nor has any judgment been rendered thereon and there are no set-offs or counterclaims to the same; except deponent

is obligated to pay, and is ready, able and willing to pay, said bankrupt and/or his Trustee in Bankruptcy interest as provided by the terms of said lease upon said sum of \$1500.00, paid as rent as in said lease provided and herein recited, in the manner and at the time specified in said lease, and said deponent hereby offers so to do.

That prior to bankruptcy deponent paid to bankrupt an account of said interest sums aggregating \$187.50.

That deponent does not have any other or additional security for the payment of said debt than that herein mentioned and described.

That the Trustee in Bankruptcy of the above named bankrupt abandoned the herein mentioned and described lease; that bankrupt failed to make any payments accruing under said lease subsequent to the date of bankruptcy, by reason whereof Annie Jensen on October 1st, 1930, leased the premises described in the herein mentioned and described lease to Carrol Chevrolet Motor Company upon a written lease beginning October 1st, 1930, and extending for a period of five years, and at a rental of One Hundred (\$100.00) Dollars a month, for the first four months, One Hundred Twenty-five (\$125.00) Dollars a month for [13] the next five months, and the balance of the term of the lease at One Hundred Fifty (\$150.00) Dollars per month. Said leasing was to minimize the loss to the original Lessor, O. Stanley Dresher, and the said lease was made upon the best terms that Annie Jensen could procure;

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That on May 2d, 1930, Albert Jensen of Miami, Arizona, a bachelor, sold and transferred to Annie Jensen the rent theretofore accrued and to thereafter accrue and conveyed the real property described in the lease herein mentioned and described to Annie Jensen, and said Annie Jensen is now the owner of said real property, and by virtue of said transfer and conveyance she is entitled to the rents accrued prior to bankruptcy, as herein stated.

ANNIE JENSEN,  
CHRISTIAN JENSEN,  
Creditors.

Subscribed and sworn to before me this the 21st day of January, 1931.

PAUL N. LENOZ,  
Notary Public in and for the County of Gila,  
State of Arizona.

My commission expires Sept. 4th, 1931."

and upon objection of the trustee thereto, in the words and figures following, to wit:

"COMES NOW T. J. Sparkes, the trustee in bankruptcy of the estate of O. Stanley Dresher, bankrupt above-named, and objects to the amended proof of debt for the sum of \$621.00 filed by Annie Jensen and Christian Jensen, her husband, of Miami, Arizona, on the following grounds, to-wit:

That belonging to this estate in bankruptcy and held by said claimants and which although demand has been made therefore, they neglect, fail and refuse to turn over or pay

to this estate in bankruptcy is the following sum of money, to-wit: \$1,500.00, cash deposit made by bankrupt under the lease on which said amended claim is founded, together with interest at the rate of ten (10%) per cent per annum from November 30th, 1928, (date of said lease), less credits for any payment or payments of interest to said bankrupt that may be shown to have been made, and less rentals due and unpaid under said lease up to the time of the filing of the petition in bankruptcy, to-wit, July 18, 1930, and further less such charge or amount as may be allowed by the Court for the use and occupancy by this estate in bankruptcy of the [14] premises covered by the lease from the time of the filing of the petition in bankruptcy, to-wit, July 18, 1930, to the time of abandonment of said lease and vacating of said premises, to-wit, September 24, 1930.

WHEREFORE, this trustee prays: That said amended proof of debt of Annie Jensen and Christian Jensen, her husband, may not be allowed, and that this Honorable Court order and direct said Annie Jensen and Christian Jensen to turn over and to pay to this trustee for the benefit of said estate in bankruptcy said sum of money held by them as aforesaid.

Dated this 26th day of January, 1931.

T. J. SPARKES,

Trustee in Bankruptcy.

WALTER J. THALHEIMER,

Attorney for Trustee."



The Referee entered an order thereon, which is in the words and figures following, to wit:

“At Phoenix, Arizona, in said District, on this 11th day of April, 1931, before Honorable R. W. Smith, Referee in Bankruptcy.

IT IS ORDERED that the sum of Fifteen Hundred Dollars (\$1500.00) paid by the bankrupt on November 30, 1928 to lessor, predecessor in interest to claimant, was an advancement for the security of the lessor, title to which remained in the bankrupt, and, on his bankruptcy, title vested in the trustee; that interest on said sum of Fifteen Hundred Dollars (\$1500.00) from November 30, 1928, to July 18, 1930, at the rate of ten per cent per annum, is due from claimant to the bankrupt estate; that the amount of said interest is Two Hundred Thirty-two and 80/100 Dollars (\$232.80) less One Hundred Eighty-seven and 50/100 Dollars (\$187.50) paid by claimant prior to bankruptcy, or Forty-five and 30/100 Dollars (\$45.30).

IT IS ORDERED from said sum of Fifteen Hundred Forty-five and 30/100 Dollars (\$1545.30) rental in the sum of Six Hundred Twenty-one Dollars (\$621.00) due claimant for rent accrued prior to bankruptcy be offset and, in addition thereto, the further sum of Two Hundred Twenty Dollars (\$220.00), which sum is hereby allowed for the use and occupancy of the leased premises by the trustee from July 18, 1930, to September 24, 1930, be also offset.

IT IS ORDERED that Annie Jensen and Christian Jensen pay to the trustee in bankruptcy

of the above named bankrupt Seven Hundred Four and 30/100 Dollars (\$704.30), the amount herein found due from claimants to said bankrupt estate. [15]

Dated this 11th day of April, 1931.

R. W. SMITH,  
Referee in Bankruptcy.

Service of the foregoing and receipt of copy is acknowledged this 21st day of April, 1931.

STOCKTON & PERRY,  
Attorneys for Claimants."

Claimants took a review from the order of the Referee and in the Referee's Certificate on Review, the following questions were presented:

1. Was it error to order that the Fifteen Hundred Dollars (\$1500.00) paid by the bankrupt November 30, 1928, to the predecessor in interest of claimants, petitioners, was an advancement for the security of the lessors and that title remained in the bankrupt and on his bankruptcy title vested in the trustee.

2. Was it error to order that Two Hundred Twenty Dollars (\$220.00) be allowed for the use and occupancy of the leased premises by the trustee from July 18, 1930, the date of bankruptcy, to September 18, 1930, the date the lease was abandoned by the trustee and the premises surrendered to the claimants, petitioners, or should there have been ordered allowed for the use and occupancy of said leased premises by said trustee for said period the rent stipulated in the lease, to wit, One Hundred Seventy-five Dollars (\$175.00) per

month, or the total sum of Three Hundred Eighty-five Dollars (\$385.00).

3. Was it error to order that claimants, Annie Jensen and Christian Jensen, pay to the trustee in bankruptcy Seven Hundred Four and 30/100 Dollars (\$704.30) representing the difference between Fifteen Hundred Dollars (\$1500.00) and unpaid interest thereon, and the rent accruing prior to bankruptcy plus the amount allowed for use and occupancy of the leased premises by the trustee after bankruptcy and to September 24, 1930, the date the lease was [16] abandoned by the trustee and possession surrendered to claimants, petitioners.

The United States District Judge modified the order of the Referee and as modified affirmed the same. The order of said District Judge is in the words and figures following, to wit:

“The petition to review Referee’s order in the above entitled and numbered bankruptcy matter came on regularly for hearing before the Honorable Fred C. Jacobs, United States District Judge, on May 25th, 1931, at which time the petitioners were represented by their attorneys, Stockton & Perry, and the Trustee in Bankruptcy was represented by his attorney, Walter J. Thalheimer.

After argument of counsel, the Court, being fully advised in the premises,

IT IS ORDERED that the Order of the Referee, dated April 11th, 1931, be modified so as to read as modified as follows:

At Phoenix, Arizona, in said District, on this

11th day of April, 1931, before Honorable R. W. Smith, Referee in Bankruptcy.

IT IS ORDERED that the sum of Fifteen Hundred Dollars (\$1500.00) paid by the bankrupt on November 30, 1928, to the lessor, predecessor in interest to claimant, was an advancement for the security of the lessor, title to which remained in the bankrupt, and, on his bankruptcy, title vested in the trustee; that interest on said sum of Fifteen Hundred Dollars (\$1500.00) from November 30, 1928, to July 18, 1930, at the rate of ten per cent per annum, is due from claimant to the bankrupt estate; that the amount of said interest is Two Hundred Thirty-two and 80/100 Dollars (\$232.80) less One Hundred Eighty-seven and 50/100 Dollars (\$187.50) paid by claimant prior to bankruptcy, or Forty-five and 30/100 Dollars (\$45.30).

IT IS ORDERED that from said sum of Fifteen Hundred Forty-five and 30/100 Dollars (\$1545.30), rental in the sum of Six Hundred Twenty-one Dollars (\$621.00) due claimant for rent accrued prior to bankruptcy be offset and, in addition thereto, the further sum of Four Hundred Twenty-nine Dollars (\$429.00), which sum is hereby allowed for the use and occupancy of the leased premises by the Trustee from July 18th, 1930, to October 1st, 1930, be also offset.

IT IS ORDERED that Annie Jensen and Christian Jensen pay to the Trustee in Bankruptcy of the above named bankrupt Four Hundred Ninety-five and 30/100 Dollars (\$495.30), the

amount herein found due from claimant to said bankrupt estate.

Dated this 11th day of April, 1931.

R. W. SMITH,  
Referee in Bankruptcy. [17]

Service of the foregoing and receipt of copy is acknowledged this 21st day of April, 1931.

STOCKTON & PERRY,  
Attorneys for Claimants.

And as so modified, the said Order of the Referee is hereby approved and affirmed.

An exception is allowed the Trustee and an exception is also allowed petitioners.

Done in open *court* this, the twenty-fifth day of May, 1931.

F. C. JACOBS,  
United States District Judge."

WALTER J. THALHEIMER,  
Attorney for Trustee.

HENDERSON STOCKTON,

ALLAN K. PERRY,

E. G. FRAZIER,

STANLEY A. JERMAN,

THOMAS P. RIORDAN,

Attorneys for Claimants, Annie Jensen and Christian Jensen.

The above and foregoing statement of the case prepared and signed by the parties in interest, showing how the questions arose and were decided in the District Court, is approved as being all

that is essential to a decision of such questions by the appellate court.

F. C. JACOBS,

United States District Judge.

Dated June 20th, 1931.

Filed Jun. 22, 1931. [18]

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[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable F. C. JACOBS, United States District Judge for the District of Arizona:

Annie Jensen and Christian Jensen, conceiving themselves aggrieved by an order and decree of the United States District Court for the District of Arizona, made and entered on the Twenty-fifth day of May, 1931, modifying and, as modified, affirming an order of the Referee, dated the eleventh day of April, 1931, in the above-entitled matter of O. Stanley Dresher, Bankrupt, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said order and decree of May 25th, 1931, and pray that this appeal be allowed and that citation upon appeal issue, as provided by law, and that a transcript of the record, proceedings and documents upon which said order and decree were made, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, within said Circuit, as does the law and the rules

of such court in such cases made and provided require.

Dated at Phoenix, Arizona, this the twentieth day of June, 1931.

HENDERSON STOCKTON,  
ALLAN K. PERRY,  
E. G. FRAZIER,  
THOMAS P. RIORDAN,  
STANLEY A. JERMAN,

Solicitors for Annie Jensen and Christian Jensen. [19]

Received copy of the within this 20th day of June, 1931.

WALTER J. THALHEIMER,  
Attorney for T. J. Sparkes, Trustee.

Filed Jun. 20, 1931. [20]

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[Title of Court and Cause.]

### ASSIGNMENT OF ERROR.

Come now Annie Jensen and Christian Jensen, by Henderson Stockton, Allen K. Perry, E. G. Frazier, Thomas P. Riordan and Stanley A. Jerman, their solicitors of record herein, and in connection with their appeal herewith filed make it known that in the record, proceedings and the decree appealed from manifest error has intervened to the prejudice of Annie Jensen and Christian Jensen, appellants in these things, to wit:

## FIRST.

The District Court erred in ordering that the sum of Fifteen Hundred (\$1500.00) Dollars, paid by the bankrupt on November 30th, 1928, to lessor, predecessor in interest to claimants, was an advancement for the security of the lessor and that title to said Fifteen Hundred (\$1500.00) Dollars remained in the bankrupt and on his bankruptcy title thereto vested in the Trustee, because the lease, pursuant to which same was paid, provides that said sum was paid as rent and the admitted facts so show.

## SECOND.

The District Court erred in directing that Six Hundred Twenty-one (\$621.00) Dollars due claimants for rent accrued prior to bankruptcy and the further sums of Four Hundred Twenty-nine (\$429.00) Dollars allowed for the use and occupancy of the leased premises from July 18th, 1930, to October 1st, 1930, be offset against the sum of Fifteen Hundred Forty-five and 30/100 (\$1545.30) Dollars, and that the difference, to wit: Four Hundred Ninety-five [21] and 30/100 (\$495.30) Dollars, be paid by Annie Jensen and Christian Jensen to the Trustee in Bankruptcy of O. Stanley Dresher, Bankrupt, because Fifteen Hundred (\$1500.00) Dollars of the said sum of Fifteen Hundred Forty-five and 30/100 (\$1545.30) Dollars was paid as rent and was not given by lessor at the time the lease in question was made as security and because it should have been ordered that the Trustee in Bankruptcy pay to Annie Jensen and Christian Jensen said respective



sums of Six Hundred Twenty-one (\$621.00) Dollars and Four Hundred Twenty-nine (\$429.00) Dollars, less Forty-five and 30/100 (\$45.30) Dollars, and because Four Hundred Ninety-five and 30/100 (\$495.30) Dollars was neither legally due nor payable by Annie Jensen and Christian Jensen to said Trustee. In other words, the amended proof of claim of Annie Jensen and Christian Jensen should have been allowed without offset upon the agreed statement of facts.

BY REASON WHEREOF, Annie Jensen and Christian Jensen pray that the decree appealed from may be reversed and remanded, with directions to proceed in accordance with the law.

HENDERSON STOCKTON,  
ALLAN K. PERRY,  
E. G. FRAZIER,  
THOMAS P. RIORDAN,  
STANLEY A. JERMAN,

Solicitors for Annie Jensen and Christian Jensen.

Received copy of the within this 20th day of June 1931.

WALTER J. THALHEIMER,  
Attorney for T. J. Sparkes, Trustee.

Filed Jun. 20, 1931. [22]

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[Title of Court and Cause.]

STIPULATION THAT NO COST BOND ON  
APPEAL BE FILED.

IT IS HEREBY STIPULATED by and between

Annie Jensen and Christian Jensen, by their attorneys, Stockton & Perry, and T. J. Sparks, Trustee in Bankruptcy of O. Stanley Dresher, Bankrupt, by his attorney, Walter J. Thalheimer, that no cost bond be given by either party on appeal to the United States Circuit Court of Appeals from the order of the United States District Judge, dated May 25th, 1931, modifying and, as modified, affirming an order of the Referee, dated April 11th, 1931.

HENDERSON STOCKTON,

ALLAN K. PERRY,

E. G. FRAZIER,

T. P. RIORDAN,

STANLEY A. JERMAN,

Attorneys for Annie Jensen and Christian Jensen.

WALTER J. THALHEIMER,

Attorney for Trustee in Bankruptcy.

Filed Jun. 20, 1931. [23]

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[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND DIRECTING THAT NO BOND ON APPEAL BE REQUIRED.

Annie Jensen and Christian Jensen, having within the time prescribed by law filed herein their petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order and decree of the above-entitled District Court, made and entered in the above numbered and entitled cause, under date of May 25th, 1931,

modifying and, as modified, affirming an order of the Referee, dated the eleventh day of April, 1931.

THEREFORE, upon motion of Henderson Stockton, one of the solicitors for Annie Jensen and Christian Jensen,—

IT IS HEREBY ORDERED that the appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and decree of said District Court, hereinbefore referred to, be and the same is hereby allowed and that a certified transcript of the record be forthwith by the Clerk of this District Court transmitted to said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

IT APPEARING to the Court that interested parties have waived an appeal bond by a written stipulation filed herein, it is, by reason thereof, ORDERED that no appeal bond be required on this appeal.

Dated June 22<sup>st</sup>, 1931.

F. C. JACOBS,  
United States District Judge.

Received copy of the within this 20th day of June, 1931.

WALTER J. THALHEIMER,  
Attorney for T. J. Sparkes, Trustee.

Filed Jun. 22, 1931. [24]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD  
ON APPEAL.

To the Clerk of the Above-entitled Court:

YOU ARE HEREBY DIRECTED to prepare and certify a transcript of the record in the above-entitled cause for the use of the United States Circuit Court of Appeals for the Ninth Circuit, and to include therein the following:

1. A statement of the case, showing how the questions arose and were decided in the District Court, prepared and signed by the parties with the approval of the District Court.

2. Order or decree of the District Court, dated the twenty-fifth day of May, 1931.

3. The petition for appeal of Annie Jensen and Christian Jensen, filed herein under date of June 20th, 1931.

4. Assignments of error filed herein by Annie Jensen and Christian Jensen under date of June 20th, 1931.

5. The order allowing appeal filed June 20th, 1931.

6. Citation upon appeal.

7. This praecipe.

Dated June 20th, 1931.

HENDERSON STOCKTON,  
ALLAN K. PERRY,  
E. G. FRAZIER,  
THOMAS P. RIORDAN,  
STANLEY A. JERMAN,

Solicitors for Annie Jensen and Christian Jensen.

[25]

I hereby acknowledge receipt of service of praecipe for record on appeal and waive notice of the filing thereof.

Dated June 20th, 1931.

WALTER J. THALHEIMER,  
Solicitor for Trustee in Bankruptcy of O. Stanley  
Dresher, Bankrupt.

Filed Jun. 22, 1931. [26]

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CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD.

United States of America,  
District of Arizona,—ss.

I, J. Lee Baker, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said court, including the records, papers and files in the Matter of O. Stanley Dresher, Bankrupt, numbered B.-557—Phoenix, on the docket of said court.

I further certify that the attached pages, numbered 1 to 30, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as said Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$5.90, and that said sum has been paid to me by counsel for the appellant.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the seal of the said court this 26th day of June, 1931.

[Seal]

J. LEE BAKER,

Clerk. [27]

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[Title of Court and Cause.]

#### CITATION ON APPEAL.

The President of the United States of America, to  
T. J. Sparks, Trustee in Bankruptcy of O.  
Stanley Dresher, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, within thirty days

from and after the date of this citation, pursuant to an order allowing an appeal duly made and entered and filed in the office of the Clerk of the above-named District Court, under date of the twentieth day of June, 1931, which said appeal is from the final order and decree of said District Court in the above numbered and entitled matter, made and entered on the twenty-fifth day of May, 1931, modifying and, as modified, affirming an order of the Referee of the eleventh day of April, 1931, to show cause, if any there be, why said order and decree rendered against said Annie Jensen and Christian Jensen, appellants, should not be reversed and set aside and why justice should not be done to the parties in that behalf.

WITNESS the Honorable F. C. JACOBS, United States District Judge, in the District of Arizona, this the twentieth day of June, A. D. 1931, and of the Independence of the United States of America the One Hundred Fifty-sixth.

Dated June 22d, 1931.

[Seal]

F. C. JACOBS,  
United States District Judge. [28]

I hereby acknowledge receipt of service of the above and foregoing citation on appeal this, the twentieth day of June, 1931.

WALTER J. THALHEIMER,  
Solicitor for Trustee in Bankruptcy of O. Stanley  
Dresher, Bankrupt. [29]

Filed Jun. 22, 1931. [30]

[Endorsed]: No. 6533. United States Circuit Court of Appeals for the Ninth Circuit. Annie Jensen and Christian Jensen, Appellants, vs. T. J. Sparkes, Trustee in Bankruptcy of O. Stanley Dresher, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed July 23, 1931.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Frank H. Schmid,  
Deputy Clerk.